

Appeal No. 03-0327

Cir. Ct. No. 95CV000138

**WISCONSIN COURT OF APPEALS
DISTRICT III**

**JOHN D. HESS, JOAN M. HESS, ADRIENNE V. HESS,
AND EMILY M. HESS, A MINOR, BY WILLIAM SMOLER,
HER GUARDIAN AD LITEM,**

**PLAINTIFFS-RESPONDENTS-CROSS-
APPELLANTS,**

WAUSAU INSURANCE COMPANIES,

SUBROGATED-PLAINTIFF,

v.

JUAN FERNANDEZ III, M.D.,

**DEFENDANT-APPELLANT-CROSS-
RESPONDENT,**

WISCONSIN PATIENTS COMPENSATION FUND,

**DEFENDANT-CO-APPELLANT-CROSS-
RESPONDENT.**

FILED

May 20, 2004

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Deininger, P.J., Vergeront and Higginbotham, JJ.

We certify the following question: May a patient who successfully brings a medical malpractice claim against her psychiatrist recover costs and

actual attorney fees under WIS. STAT. § 51.61(7)(a) (2001-02),¹ costs and fees that in this case will exceed \$1,000,000? The answer depends on whether § 51.61(1)(f) applies only to mental health treatment provided by a county, or whether it applies to all mental health care providers, as we implicitly ruled in *Wright v. Mercy Hospital*, 206 Wis. 2d 449, 469, 557 N.W.2d 846 (Ct. App. 1996). Stated differently, the issue is whether the statute provides only a public guarantee of prompt and adequate mental health treatment or whether it also imposes an actionable private right.

This case involves the controversial use of “recovered memories” to treat psychiatric patients. Joan Hess brought an action against her psychiatrist, Juan Fernandez III, M.D., alleging that he had acted negligently in treating her, causing her sustained and substantial injury. A jury concluded that Fernandez had been negligent. After the verdict had been reached, Hess argued that she had been denied the right to “prompt and adequate treatment” under WIS. STAT. § 51.61(1)(f), and was therefore entitled to costs and attorney fees under § 51.61(7)(a). Although Hess had not pleaded a cause of action under § 51.61(1)(f), the circuit court allowed her to amend her pleadings and concluded that § 51.61(1)(f) had been violated because the jury had found Fernandez negligent. The circuit court awarded Hess nearly \$1,000,000 in attorney fees, and the parties entered into a stipulation indicating the current amount of costs and attorney fees to be \$1,250,576.73.

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

WISCONSIN STAT. ch. 51 is entitled “State Alcohol, Drug Abuse, Developmental Disabilities and Mental Health Act.” WISCONSIN STAT. § 51.61(1) discusses the rights of patients “receiving services for mental illness, developmental disabilities, alcoholism or drug dependency.” Section 51.61(1)(f) provides that every patient shall:

Have a right to receive prompt and adequate treatment, rehabilitation and educational services appropriate for his or her condition, under programs, services and resources that the county board of supervisors is reasonably able to provide within the limits of available state and federal funds and of county funds required to be appropriated to match state funds.

(Emphasis added.) Section 51.61(7)(a) allows recovery of costs and attorney fees:

Any patient whose rights are protected under [§ 51.61] who suffers damage as a result of the unlawful denial or violation of any of these rights may bring an action against the person, including the state or any political subdivision thereof, which unlawfully denies or violates the right in question. The individual may recover any damages as may be proved, together with exemplary damages of not less than \$100 for each violation and such costs and reasonable actual attorney fees as may be incurred.

(Emphasis added.)

Fernandez argues that WIS. STAT. § 51.61(1)(f) applies only to mental health treatment provided by a county because the statute discusses “programs, services and resources *that the county board of supervisors is reasonably able to provide.*” (Emphasis added.) Fernandez contends that the statute provides a public guarantee of prompt and adequate treatment, not an actionable private right.

Fernandez and the Wisconsin Patients Compensation Fund also argue that WIS. STAT. § 51.61(1)(f) does not apply to this case because medical

malpractice claims are governed exclusively by WIS. STAT. ch. 655. *See Finnegan v. Wisconsin Patients Comp. Fund*, 2003 WI 98, ¶22, 263 Wis. 2d 574, 666 N.W.2d 797 (“[I]t is now firmly established that Chapter 655 constitutes the exclusive procedure and remedy for medical malpractice cases in Wisconsin.”). That statute prohibits the Fund from using monies held in trust for any purpose other than ch. 655 claims. *See* WIS. STAT. § 655.27(6). The Fund contends that the purpose of ch. 655 to curb rising health care costs would be eviscerated by making it liable for attorney fees under § 51.61(7)(a).

Hess, on the other hand, contends that she is entitled to costs and attorney fees, relying on our decision in *Wright*, 206 Wis. 2d at 469. In *Wright*, we concluded that a patient was entitled under WIS. STAT. § 51.61(7)(a) to costs and attorney fees incurred in bringing a malpractice action for negligent mental health treatment. Our decision in *Wright* supports the view that costs and attorney fees are available under § 51.61(7)(a) in successful negligence actions against mental health care providers. However, we did not consider in *Wright* whether § 51.61(1)(f) provides both a public guarantee and an actionable private obligation. We also did not consider the issue of WIS. STAT. ch. 655 exclusivity. Because those issues were not before us, our decision in *Wright* may have been based on an incomplete analysis and the conclusion we reached in *Wright* may therefore be incorrect. Because we cannot overrule or modify *Wright*, we believe the supreme court should decide when § 51.61(1)(f) allows costs and attorney fees, harmonizing or modifying *Wright* as necessary.

Should the supreme court decide that WIS. STAT. § 51.61(1)(f) applies only to mental health care provided by the county, the remaining issues in this case will largely be resolved. However, should the supreme court decide that § 51.61(1)(f) applies to mental health care other than that provided by a county,

several additional questions arise. First, must the mental health care provider have notice, either by way of pleadings or by oral notification during a trial, that costs and attorney fees are being sought under § 51.61(7)(a)? Here, the issue was not raised until after trial, which the defendants claim is unfair because the jury did not consider whether the statute had been violated as a separate verdict question. The defendants also point out that they were not aware that they should factor a potentially large cost and attorney fee award into the settlement negotiations.

Second, is a finding of negligence alone sufficient to find a violation of the statute, or must the jury address separately whether the patient received “prompt and adequate treatment” under WIS. STAT. § 51.61(1)(f)? Furthermore, is negligent treatment always a violation of the statute?

Third, who is liable for the costs and attorney fees—the individual mental health care provider, the facility for which he or she works, if any, or the county? Is the Fund obligated to provide coverage?

We respectfully certify this case to the supreme court for consideration of these issues. *See* WIS. STAT. RULE 809.61.²

² This case also presents other issues pertaining to costs and attorney fees that we have not addressed.

